No. 733

In the Supreme Court of the United States

October Term, 1967

PERMA LIFE MUFFLERS, INC.; et. al.,
Petitioners,

vs.

INTERNATIONAL PARTS CORPORATION; et. al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF IN OPPOSITION

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SUBJECT INDEX

CITATIONS

Cases

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THE COURT HAS NO JURISDICTION

The judgment of the court of appeals was entered on April 25, 1967 and a petition for rehearing *en banc* was denied on June 7, 1967. Orders entered by this Court on August 30 and October 2, 1967 extended the time to file the petition for a writ of certiorari to October 3 and October 17, respectively. The petition was presented to the Clerk on October 17, 1967, along with certified copies of the plaintiffs'[1] and defendants' appendices in the court

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[1] Throughout this brief, petitioners are referred to as "plaintiffs" and respondents as "defendants."

of appeals. However, "the certified record required by Rule 21" was not presented at that time nor had it been filed as of November 6, 1967, more than 150 days after the denial of the petition for rehearing by the court of appeals.

Rule 22-3 of the Court's Rules,[2] effective October 2, 1967, requires that the petition "and the certified record required by Rule 21" be filed "within the time prescribed by law." Section 2101(c) prescribes that in cases of this type, the petition for a writ of certiorari must be filed within 90 days and that such time cannot be extended beyond an additional 60 days (28 U.S.C. 2101(c)). Rule 21 of the Court's Rules necessitates that "[t]he entire record in the court" below be filed unless otherwise agreed. There has been no such agreement. Plaintiffs' failure to file the certified record with the petition within the statutory period deprives the Court of jurisdiction. *Toledo Scale Co.* v. *Computing Scale Co.*, 261 U.S. 399, 418 (1923); *Rust Land Co.* v. *Jackson*, 250 U.S. 71, 76 (1919).

QUESTIONS PRESENTED

If this Court determines that it has jurisdiction, the petition presents only one main question: Should this Court grant a writ of certiorari to review the particular undisputed facts of a private antitrust treble damage claim to determine whether the courts below correctly applied the established defense of *in pari delicto?*

Subsidiary questions include:

1. Was the court of appeals correct in affirming, on the basis of the doctrine of *in pari delicto,* the judgment of the district court dismissing, on defendants' summary judg-

[2] Pertinent provisions of the statute and rules are set forth in Appendix A, *infra,* pp. App. 1, App. 2.

ment motion, two counts of plaintiffs' antitrust treble damage complaint where the undisputed facts in the record show that the plaintiffs: (a) entered into Midas franchise agreements voluntarily, solemnly, and without coercion; (b) thereafter eagerly requested and were granted additional Midas franchises; (c) at all times voluntarily acceded to, fostered, and participated fully with the defendants in the promotion of the Midas program; (d) during their three or four year association with Midas, profited to the extent of hundreds of thousands of dollars from the very program now claimed to have been violative of the antitrust laws; (e) unilaterally exercised the ever-present right to terminate the Midas franchise on 30 days' notice only when a competitor of Midas offered what plaintiffs believed to be a more financially attractive franchise arrangement; and, (f) then, brought this action, not to recoup financial business losses suffered while acting as Midas franchisees, but to claim additional profits which they alleged might have been made in the Midas shops they did open, and to also claim additional profits which allegedly might have been made in shops they did not open because the defendants would not grant them even more allegedly illegal franchises?

2. Was the court of appeals correct in affirming the dismissal of Count One of the complaint upon the alternative ground that the individual and corporate defendants constituted a single business entity?

RULES AND STATUTES INVOLVED

The pertinent portions of Rules 21 and 22 of this Court, of Rule 56 of the Federal Rules of Civil Procedure and of Section 2101(c) are set forth in Appendix A hereof, pp. App. 1, App. 2, *infra*. The other statutes involved are set forth in Appendix D to plaintiffs' petition.

STATEMENT OF FACTS

The material and undisputed facts upon which the lower courts relied and which are recited in detail in the opinion of the court of appeals (CAO B 3-9) were taken from the plaintiffs' own testimony in depositions and interrogatory answers (D. App. 53-109) and from an unchallenged affidavit of defendants' principal executives (D.App. 41-49).[3]

The plaintiffs are ten corporations and individual proprietorships, but, in essence, are four individuals—Gregory Skarupa, Maxwell Ross, Joseph Pierce and Claude Wheeler—who, after being licensed under a franchise agreement with defendants, used the "Midas" and "Midas Muffler Shops" trade name, trademarks and service marks in operating such shops in various states. Defendants are International Parts Corp., three of its subsidiary corporations, plus six individual officers or agents of the corporate defendants. These ten technically separate legal persons constituted the single entity by which Nathan Sherman and his son, Gordon Sherman, conducted their family-owned business (D. App. 41-44).

MIDAS HISTORY[4]

Prior to defendants' introduction of the Midas merchandising concept and franchise plan in late 1955, exhaust parts were sold to consumers from retail outlets, such as

[3] The court of appeals' opinion is cited "CAO" followed by the page number of plaintiffs' Appendix B; the district court opinion is cited "DCO" followed by the page number of plaintiffs' Appendix E or F; the petition for certiorari is cited "Pet." Defendants' appendix in the court of appeals is cited "D. App." while the Appendix attached hereto is cited "App." Emphasis within quotations is supplied unless otherwise noted.

[4] The complete and undisputed history of the Midas franchise program is set forth in the affidavit of Nathan and Gordon Sherman which is reprinted in full in defendants' appendix in the court of appeals (D. App. 41-49).

garages and service stations, and were merchandised like most automotive replacement parts; they received no individual attention, enjoyed no consumer brand consciousness, and were sold subject to a labor installation charge (D. App. 43-44).

Midas changed this with its nationally advertised trade name, nationwide chain of specialized exhaust system shops, free installation, and a unique guarantee to replace a worn-out muffler at any Midas Shop throughout the nation. A network of franchised dealers — each of whom owned his own retail outlet identified by the "Midas" trade names and service marks — invited the public to a chain of shops specializing in exhaust parts. The typical dingy auto repair shops were replaced by the Midas atmosphere of cleanliness, comfort and prompt, courteous service (D. App. 44-46).

Success for this merchandising concept, and for each Midas dealer, necessitated that the motorist recognize the Midas name and have confidence that each dealer was an exhaust specialist, handled the same quality product, gave the same prompt and dependable service, and honored the same unique Midas guarantee. Millions were spent by defendants and the Midas dealers in national and local advertising of this image (D. App. 46, 84-85).

No franchise fee, prototype building, or purchase or lease of capital equipment or real estate from Midas was required. A franchise agreement licensing the use of the trademark "Midas" and the service mark "Midas Muffler Shop" was tendered to each prospective dealer.[5]

[5] One Midas trademark licensed by the agreement covered "Mufflers for internal combustion engines and parts thereof — namely, tail pipes, exhaust pipes, and muffler clamps". A service mark covered "Inspection of automotive exhaust systems and installation of automotive mufflers and exhaust system parts" (D. App. 110-111).

It was cancelable by either party on thirty days' notice with no restrictions on the dealer's activities thereafter (D. App. 47). Virtually every dealer enjoyed substantial monetary gains from participation in the Midas program; and, after obtaining their first Midas franchise agreement, most dealers, as did all the plaintiffs, subsequently sought and were granted franchises for additional shops (D. App. 49; App. 56-57, 64-65, 72, 78-79).

PLAINTIFFS' PARTICIPATION IN THE MIDAS PROGRAM[6]

Although plaintiffs operated in separate areas, had different pre-Midas business experience and were previously unacquainted with each other, a remarkable similarity existed in their total involvement in the Midas program during the 1955-1959 span of plaintiffs' relationships with defendants.

Plaintiffs Skarupa and Wheeler sought out defendants, learned about the franchise provisions, and promptly opened shops (App. 54-55, 77-78). Plantiffs Pierce and Ross, who then were selling automotive parts, investigated the Midas program and joined "so as not to invite competition" and because it was "a way of making some real money" (App. 71-72, 63-64; D. App. 95, 98). Immediate profits resulted from these original shops[7] and each

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[6] The complete facts on each plaintiff's entry and participation in the Midas program were set forth in the trial court Appendix, a narrative and chronological summary of thousands of pages of plaintiffs' deposition and interrogatory testimony which is attached hereto in Appendix B, *infra*, pp. 51-83. Not one statement in this Appendix was ever challenged by plaintiffs throughout these proceedings (CAO B-3).

[7] See Argument, *infra*, p. 21 for the profits plaintiffs received from their participation in the Midas program.

plaintiff, now more aware of the unchanged franchise provisions and actually experienced in the program, sought additional franchises. Within two years, Skarupa expanded to four Midas Shops in the Washington, D.C. area (App. 56-57). Ross from a home base in Muskegon, Michigan, signed five more franchises, including two in a temporary expansion to Minneapolis, a distant but "larger metropolitan area" which he wanted; eventually he opened his fourth shop in Michigan almost four years after his first franchise (App. 64-65; D. App. 93). In the fourteen months following Pierce's first franchise, he expanded to six Midas Shops in five central New York cities; he also inquired about additional franchises in other cities and finally opened a seventh Midas Shop without asking for a franchise (App. 71-72). Wheeler "wanted to expand" in the St. Louis area, he didn't want "just the one franchise," and within nine months he had opened two additional shops; his last Midas shop was opened almost three years after his original agreement (App. 78-79; D. App. 103).

Eventually, plaintiffs had twenty shops, each bearing the name "Midas Muffler Shop," and displaying Midas advertising. Defendants' national advertising in each plaintiff's market along with plaintiffs' local advertising identified these shops with the national Midas image of exhaust system specialists.[8] Only ten dealers per year were on the National Advisory Council of leading Midas dealers; yet, each plaintiff was a member. Plaintiffs contributed ideas in support of the Midas program through speeches at dealers' meetings and articles in the dealers' magazine and actively encouraged others to become Midas dealers (App. 58, 66, 73, 79).

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[8] See Argument, *infra*, p. 20.

When plaintiffs decided to cancel their franchises, they continued without interruption to sell exhaust parts from the same locations.[9]

For over a year, Wheeler waited to see what was going to be done with "a new Midas franchise in St. Louis"; when this franchise went to a new dealer, Wheeler terminated his Midas franchises, signed a competitor's exclusive franchise for a larger area, but would have returned to Midas if he had been granted the "exclusive" Midas franchise he demanded (App. 80-81).

For six months, Pierce considered "a change," to a competitive product, meanwhile using Midas Shops to sell another brand muffler with a Midas-type guarantee under conditions which he admitted did not make the customer aware of what he was receiving, and then Pierce terminated one of his seven franchises; when Midas exercised its right and terminated the remaining franchises, Pierce wrote that he was willing "to co-operate fully" in this termination (App. 74-75; D. App. 108).

After defendants did not concur in Ross' plans to further expand, he terminated his Midas franchises and signed a competitor's exclusive franchise for Michigan only five months after his last Midas franchise had been executed (App. 66-67).

Skarupa wanted three more Midas Shops; when he was offered only one and told that additional shops would go

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[9] As plaintiffs acknowledge, competitive franchise programs were available after Midas was introduced (Pet. 27). Upon terminating Midas, plaintiffs joined the Robin Hood franchise program which was sponsored by the Maremont Corp., a competitor of International Parts; a former Midas employee was the program's chief sales executive and solicited plaintiffs to join that program (App. 59, 67, 75, 80).

to other dealers, he terminated his Midas franchises and signed a competitor's exclusive franchise for his marketing area (App. 58-60).

This eagerness for still more franchises in order to further participate in and benefit from the Midas program continued up to the moment plaintiffs terminated their agreements. The amended complaint even seeks damages for defendants' refusal to accede to plaintiffs' repeated requests "to expand the area of their business" and "to increase the number of retail outlets which they operated. . . ." (D. App. 26).

In its opinion the court of appeals succinctly summarized the facts and the result which necessarily follows from such facts:

> "In resume', each plaintiff initially asked to become a participant in the Midas merchandising program and voluntarily, willingly and knowingly executed his first Midas franchise agreement. Each plaintiff thereafter eagerly sought additional shops in the Midas program and voluntarily executed additional franchise agreements for such shops. Each plaintiff at all times had the legal right to abandon the Midas program and to cancel these franchise agreements on 30 days' written notice. Three of the instant plaintiffs unilaterally terminated their franchises when it suited their convenience and the fourth acquiesced in the termination of his franchise. Furthermore, each plaintiff cooperated with defendants and all other Midas dealers in the conduct which plaintiffs now assert was illegal and injurious to their business and property. Each plaintiff accepted the benefits arising out of the franchise agreements and earned substantial and significant profits during the terms of such agreements. Each plaintiff sought to perpetuate the 'wrong' of which he now complains by acquiring additional franchises, and

Skarupa makes the contradictory claim that he is entitled to damages not only because of the 'wrong' he suffered while a party to and operating under franchise agreements but also because additional franchises which he sought were denied. Presumably, he was so well satisfied with the ill treatment which defendants assertedly imposed upon him that he sought the opportunity to suffer more of the same treatment.

It would be difficult to visualize a case more appropriate for the application of the *pari delicto* doctrine. We hold that it was properly applied and given effect by the District Court." (CAO B 12-13)

REASONS FOR DENYING CERTIORARI

Both the trial court and the court of appeals carefully reviewed the entire record and applied the long recognized and well established defense of *in pari delicto* to the undisputed facts. In substance, the courts below determined that plaintiffs freely, voluntarily and without coercion participated in and profited from the very activities claimed to be violative of the antitrust laws. Hence, the lower courts left the parties where they found them and refused to permit plaintiffs to use the courts to obtain any further fruits from the bargain alleged to be illegal.[10]

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[10] Throughout the petition, plaintiffs make the unwarranted assumption that the Midas franchise agreement was a *per se* violation of the antitrust laws, that defendants had no right to limit plaintiffs' use of the "Midas" trademarks and the "Midas Muffler Shop" service marks, and that plaintiffs after signing a franchise and becoming a part of the program, nonetheless had the right to operate a Midas Muffler Shop as an alley mechanic's shop, installing both general automotive parts and non-Midas exhaust system parts despite the public's reliance on the Midas name and the Midas guarantee for Midas quality. Such premises are unfounded. The conditions governing the operations of a Midas Muffler Shop, were reasonable and necessary, as a matter of law, to assure the American motorist that he would find the products and services which the Midas advertising, in which plaintiffs participated, represented would be obtained at a "Midas Muffler Shop." See *Susser* v. *Carvel Corp.*, 206 F.Supp. 636 (S.D.N.Y. 1962), *aff'd*, 332 F.2d 505, 516-17 (2d Cir. 1964), *cert. granted*, 379 U.S. 885, *cert. dis. as improvidently granted*, 381 U.S. 125 (1965); *Carvel Corp.*, [1965-1967 Transfer Binder], Trade Reg. Rep. ¶17,298 (FTC 1965); *Engbrecht* v. *Dairy Queen Co.*, 203 F.Supp. 714, 719-20 (D. Kan. 1962). The issue of the reasonableness of the Midas franchise plan was included in defendants' original motion for summary judgment (D. App. 38-39), but not ruled upon by either court below (CAO B-14). Since the *in pari delicto* defense would apply even if the program were illegal, defendants are not arguing the matter at this time except to note plaintiffs' unwarranted characterization of the program.

This case does not involve an important question of Federal law nor does it present a decision in conflict with applicable decisions of this Court or of any other court of appeals. The decision below represents a clearly correct application of the principle of *in pari delicto* to the facts of the case and does not warrant review by this Court.

I. The In Pari Delicto Defense Is Well Established In Antitrust Cases.

Recognition by the Court of *in pari delicto* as a valid defense in cases involving restraints of trade antedates the Sherman Act. In *Gibbs* v. *Baltimore Gas Co.,* 130 U.S. 396, 406, 412 (1889), a plaintiff was denied payment for his illegal settlement of a dispute between competitors because the rule is " ' . . . of universal operation, that none shall, by the aid of a court of justice, obtain the fruits of an unlawful bargain' " (130 U.S. at 412).[11] After the passage of the Sherman Act in 1890, the Court approved the defense in *Harriman* v. *Northern Securities Co.,* 197 U.S. 244 (1905) stating that to permit recission of an illegal sale by one with knowledge of the facts and the statute would be "in defiance of the settled rule that property delivered under an illegal contract cannot be recovered back by any party *in pari delicto.*" (197 U.S. at 295).

After the enactment of the Clayton Act in 1914, the *in pari delicto* defense was recognized with approval in *Eastman Kodak Co.* v. *Southern Photo Co.,* 273 U.S. 359 (1927):

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[11] See also *Armstrong* v. *Toler,* 11 Wheat. 258, 271-72 (1826); *Coppell* v. *Hall,* 74 U.S. 542, 558-59 (1868); *Hanauer* v. *Doane,* 79 U.S. 342, 349 (1870); *Thomas* v. *City of Richmond,* 79 U.S. 349, 355 (1870); and Pomeroy, *Equity Jurisprudence,* (4th ed.) §402.

> "[If the plaintiff] had not merely bought goods from the defendant because of a business necessity, but, with a knowledge of the defendant's purpose to monopolize, had knowingly and willfully helped to build up the monopoly, it was *in pari delicto,* and hence could not recover . . . ." (273 U.S. at 377).

During this same period of time the doctrine was also uniformly recognized and judiciously applied by many courts of appeals and district courts in antitrust cases. Courts of the Second, Third, Seventh and Ninth Circuits refused to allow a party to an antitrust violation to recover treble damages from fellow participants, reasoning generally that if a party "joined in . . . the alleged unlawful combination . . . , acquiesced for a long term of years in [it] . . .; accepted and enjoyed the profits . . . from it," then he "was precluded from asserting a right of action based upon" the combination's acts. *Bluefields S. S. Co.* v. *United Fruit Co.,* 243 Fed. 1, at 18 (3rd Cir. 1917), *dismissed on stipulation,* 248 U.S. 595 (1919).[12]

Despite the foregoing authority, plaintiffs argue that some of the decisions of this Court beginning with *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons Inc.,* 340 U.S. 211 (1951) and ending with *Simpson* v. *Union Oil Co.,* 377 U.S. 13 (1964) have abolished this firmly established defense (Pet. 8-25). This Court has never so held. What

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[12]Accord: *Eastman Kodak Co.* v. *Blackmore,* 277 Fed. 694, 699 (2d Cir. 1921); *Connecticut Importing Co.* v. *Frankfort Distilleries,* 101 F.2d 79, 81 (2d Cir. 1939); *Victor Talking Machine Co.* v. *Kemeny,* 271 Fed. 810, 816 (3rd Cir. 1921); *Tilden* v. *Quaker Oats Co.,* 1 F.2d 160, 166 (7th Cir. 1924); *First National Pictures* v. *Robison,* 72 F.2d 37, 40 (9th Cir.), *cert. denied,* 293 U.S. 609 (1934); *Morny* v. *Western Union Telegraph Co.,* 40 F.Supp. 193, 200-01 (S.D.N.Y. 1940), and *Mid-West Theatres Co.* v. *Co-Operative Theatres,* 43 F.Supp. 216, 224 (E.D. Mich. 1941).

those decisions do hold is (1) that the *in pari delicto* defense does not apply unless both plaintiff and defendant were engaged in the identical alleged violation, and (2) that it does not apply if one of the parties to the assertedly illegal agreement had been "coerced" into participation.

If a plaintiff has in no way profited from, fostered or participated in a defendant's alleged violations, this Court has understandably refused to allow a defendant to interject as a defense an irrelevant charge that a plaintiff has been involved in an unrelated and independent antitrust violation. Such a defense, attempting to utilize the equitable doctrine that he with unclean hands must go without day, was rejected in *Kiefer-Stewart* (Pet. 10, 12) where the defense was based on a price fixing conspiracy among plaintiffs which had nothing to do with alleged horizontal price fixing between defendant manufacturers. The same result occurred in *Moore* v. *Mead Service Co.*, 340 U.S. 944, 945 (1951), reversing 184 F.2d 338 (10th Cir. 1950), second opinion, 190 F.2d 540 (10th Cir. 1951), *cert. denied*, 342 U.S. 902 (1952) (Pet. 10, 20) where allegations of a unilateral attempt to monopolize by plaintiff were not a defense to defendant's alleged price discriminations.

This Court did not even discuss the *in pari delicto* defense in *Simpson* v. *Union Oil Co.*, 377 U.S. 13 (1964) and that decision is not authority for plaintiffs' contention that this established antitrust defense was there abolished. Clear evidence that the Court intended no such result is the express limitation of its holding to its particular facts:

> "*We intimate no views on any other issue;* we hold only that resale price maintenance through the present, *coercive* type of 'consignment' agreement is illegal . . . ." (377 U.S. at 24).

At best, *Simpson* and the other similar cases cited by plaintiffs (Pet. 9-10) are only authority that a defendant's "coercive" conduct precludes application of the *in pari delicto* defense, a principle to which defendants do not except. However, the non-coercive factual setting in the present litigation completely distinguishes this case from those authorities.[13] And where there is no coercion, the cases, both before and after *Simpson* and *Kiefer-Stewart*, uniformly sustain the defense. In more recent years Courts of Appeals for the Fourth, Fifth and Eighth Circuits have joined those of the Second, Third, Seventh and Ninth cited above in note 12 in recognizing its validity.[14]

As noted by the court below, and by the Third Circuit in an earlier opinion, this Court's silence as to *in pari delicto* in both *Simpson* and *Kiefer-Stewart* is certainly not sufficient authority "to annihilate a principle so long embedded in the law." [15] Likewise, plaintiffs' other

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[13] See Argument, *infra*, pp. 16-19.

[14] *Pennsylvania Water & P. Co.* v. *Consolidated G. E. L. & P. Co.*, 209 F.2d 131, 133-34 (4th Cir. 1953), *cert. denied*, 347 U.S. 960 (1954); *Kershaw* v. *Kershaw Mfg. Co.*, 209 F.Supp. 447, 454 (M.D. Ala. 1962), *aff'd*, 327 F.2d 1002 (5th Cir. 1964); *Bales* v. *Kansas City Star Co.*, 336 F.2d 439, 444 (8th Cir. 1964). It was also applied in *H. & A. Selmer, Inc.* v. *Musical Instrument Exch.*, 154 F.Supp. 697, 698-99 (S.D.N.Y. 1957); *Lehman Trading Corp.* v. *J & H Stolow, Inc.*, 184 F.Supp. 21, 23 (S.D.N.Y. 1960); *New York Credit Men's Adjustment Bureau* v. *Bruno-New York, Inc.*, 120 F.Supp. 495, 498 (S.D.N.Y. 1954); *John J. & Warren H. Graham* v. *Triangle Publications, Inc.*, 233 F.Supp. 825, 832 (E.D. Pa. 1964); *Crest Auto Supplies, Inc.* v. *Ero Mfg. Co.*, 360 F.2d 896, 900 (7th Cir. 1966).

[15] CAO B-10; *Pennsylvania Water & P. Co.* v. *Consolidated G. E. L. & P. Co.*, 209 F.2d 131, 133-34 (4th Cir. 1953), *cert. denied*, 347 U.S. 960 (1954).

authorities do not even discuss *pari delicto*, let alone purport to abolish it as an antitrust defense.[16]

Accordingly, the question here becomes simply one of whether the court below correctly applied the established doctrine to the undisputed facts, an issue not worthy of this Court's review, particularly when the facts here are so clearly distinguishable from those in the plaintiffs' authorities and so favorable to the application of *in pari delicto* as is more fully developed in the following section.

II. The Facts Of This Case Make The Defense Of In Pari Delicto Particularly Appropriate.

A. Plaintiffs' conduct here belies any assertions of "coercion" by defendants.

The differences between the facts in this case and those of plaintiffs' authorities conclusively dispose of plaintiffs' efforts to equate this case with *Simpson* v. *Union Oil Co.*, 377 U.S. 13 (1964) and similar cases based on "coercion" of the franchisee (Pet. 16-17). The "coercion" in law sufficient to vitiate the *in pari delicto* defense takes many

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[16] The *pari delicto* issue was specifically excluded from consideration in *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U.S. 219 (1948) (Pet. 10, 19-20) by the opinion of the court of appeals, 159 F.2d 71, 72 (9th Cir. 1947) which was reversed by this Court solely on the question of intrastate commerce without any mention of *in pari delicto*. *Bruce's Juices, Inc.* v. *American Can Co.*, 330 U.S. 743, 751-55 (1947) (Pet. 21) held that a purchaser cannot avoid payment for goods he obtains because of the seller's unrelated antitrust violation. *In pari delicto* was not discussed in *Radiant Burners, Inc.* v. *Peoples Gas Light & Coke Co.*, 364 U.S. 656, 657 (1961), *Radovich v. National Football League*, 352 U.S. 445, 447 (1957) and *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207, 210 (1959) (Pet. 10, 19); the first two arose on sustained motions to dismiss, not summary judgments, and the latter was concerned with a substantive law question.

forms and depends upon the economic setting or facts of the particular case. As in *Simpson* and other cases, "coercion" may result from tying a lease of land or equipment to the sales or license agreement so that when either one is cancelled, the dealer finds himself completely out of business; or, "coercion" may come from the disparity in size and thus of bargaining power between the parties.[17] Or, as in *Bales* v. *Kansas City Star Co.*, 336 F. 2d 439, 441-42, 444 (8th Cir. 1964) (Pet. 9, 22, 25, 26, 29), it may be "coercion" when plaintiffs have no alternative to dealing with defendant if they want to stay in business."[18]

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[17] *Simpson* v. *Union Oil Co.*, 377 U.S. at 21; *Atlantic Refining Co.* v. *FTC*, 381 U.S. 357, 368 (1965); *Lessig* v. *Tidewater Oil Co.*, 327 F.2d 459, 467-69 (9th Cir.), *cert. denied*, 377 U.S. 993 (1964); *Osborn* v. *Sinclair Refining Co.*, 286 F.2d 832, 841 (4th Cir., 1960), *cert. denied*, 366 U.S. 963 (1961), second opinion, 324 F.2d 566, 573 (1963). In *Shell Oil Co.* v. *F.T.C.*, 360 F.2d 470, 487 (5th Cir. 1966), *cert. denied*, 385 U.S. 1002 (1967), the court explains:

> "The inherent leverage a major oil company has over its dealers results from the market structure of the industry and the special dependence on the company of the service station dealer (who is usually also a lessee)."

Midas, which introduced its new and different program in the auto parts field in 1955 and by 1959 had total sales of $7,500,000 and 268 dealers throughout the United States, is not comparable to Union Oil with sales substantially in excess of $347,900,000 and with 3,305 gas stations in just ten states.

[18] However, that court made clear that, absent coercion, *pari delicto* will apply:

> "Of course, if the plaintiffs actually were in pari delicto with the defendants in the alleged endeavor of the Star to prevent competition . . . , the law should leave them where it finds them." 336 F.2d at 444.

But, as both courts below found, "coercion" is not "a factor herein" (CAO B-9) nor are any of the above "coercive" factors present. There were no leases or equipment purchases tied to the license or sales agreements here (Statement, *supra*, p. 5). Obviously, there were also available alternatives to doing business with the defendants here since all the Midas plaintiffs continued in business after they terminated their Midas franchises; indeed, Skarupa even advertised "I'm still doing business at the same old stands" (D. App. 106). Nor is there any "coercion" by virtue of disparities in size or bargaining power.[19] Plaintiffs' strength here is demonstrated by their unilateral total cancellation of Midas and uninterrupted continuation in business from the same locations (App. 59-60, 67-68, 74-75, 79-81) without changing "the physical facilities in any way other than to change the signs and that type of thing" (D. App. 101). This action of plaintiffs here is in marked contrast to that of the dealers in plaintiffs' authorities: Simpson, Osborn, and Lessig had each been unilaterally cancelled by the defendant, Bales was attempting to have his contract changed, and all of them were desperately trying to hold on to their agreements in order to stay in business.[20] But it was Midas in this case whose chief executive even made a special trip to St. Louis in an unsuccessful effort to keep the dealer, Wheeler, in the program (App. 80-81).

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[19] Plaintiffs' assertions here as to defendants' size and rank in the sale and distribution of "automotive exhaust parts for the replacement market" (Pet. 6) are unreliable both as to their source and because they exclude the shares in that "market" of competitive automobile dealers and other agencies of original equipment manufacturers.

[20] *Simpson* v. *Union Oil Co.*, 377 U.S. at 15; *Osborn* v. *Sinclair Refining Co.*, 286 F.2d at 834; *Lessig* v. *Tidewater Oil Co.*, 327 F.2d at 463; *Bales* v. *Kansas City Star Co.*, 336 F.2d at 441.

Finally and conclusively, it is impossible to reconcile plaintiffs' actions here in eagerly grasping for more and more franchises almost four years after the first one had been signed (Statement, *supra*, pp. 6-7), with any belated claim of coercion of the plaintiffs.

B. The decisions below are consistent with antitrust policy and do not exempt the franchise system from private antitrust enforcement.

The courts below decided only that in this case, given these facts, these plaintiffs (not a vast group of franchisees (Pet. 23-24)) should not recover for the alleged illegalities claimed to inhere in the Midas franchises. The decisions do not "constitute a privately created exemption" for all "franchisors" from Section 4 of the Clayton Act (Pet. 17), nor do they deny the "benefits of the antitrust laws" to one of the very classes they "were designed to protect" (Pet. 21-22). And the reasons for barring these plaintiffs were peculiar to this particular case only, not to franchises generally, and they applied here not merely because plaintiffs in the first instance had "solemnly subscribed" to a Midas franchise agreement (Pet. 8-9), but because of a course of conduct which continued for almost four years and was terminated only when plaintiffs decided to join forces with a Midas competitor.

With full knowledge as to its terms, each plaintiff signed his initial Midas franchise; then with personal experience as to the actual operation of the Midas program during a four-year period, these plaintiffs continued to subscribe to a total of fourteen additional franchises at a time when they could, if they chose, have done business with a competitive franchise system. The last Midas franchise was executed by a plaintiff in June 1959, almost

four years after Ross' first agreement in December 1955 (Statement, *supra,* pp. 6-7). And these weren't enough; Paragraph 22 of the complaint (D. App. 26) alleged that plaintiffs repeatedly requested, but were prevented from opening, even more Midas Shops and Skarupa specified "damages" of $20,000 per year for each of the three additional locations he didn't open (D. App. 85, 92), as well as "damages" for the stores he did open (App. 62).

Throughout their relationship with defendants and the other Midas dealers, each plaintiff joined in the Midas national advertising and voluntarily saturated their marketing area with their own local advertising to gain for themselves the benefits of the Midas image (App. 57-58, 65-66, 72-73, 79).[21] Plaintiffs' participation in the program was not limited to their own geographic areas; rather, plaintiffs joined other Midas franchisees in the dealers' National Advisory Council, gave speeches at the dealers'

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[21] These ads demonstrated to the court of appeals plaintiffs' "participation in and co-operation with the defendants in the programs of which they now complain" (CAO B 8-9) and also demonstrate the identification of the Midas trade and service marks and the Midas trade name with all parts of automotive exhaust systems, not just mufflers, and the unique desirability of the Midas guarantee good anywhere in the United States. Typical examples of plaintiffs' advertisements:

"Look for the MIDAS Sign—America's only coast-to-coast network of exclusive auto muffler shops" (D. App. 86).

"You get only nationally-advertised Midas products. . . . " (D. App. 89).

"We're specialists in just *one* thing . . . your car's exhaust system . . . " (D. App. 86).

". . . and always depend on MIDAS muffler tailpipes & dual exhaust systems for complete safety" (D. App. 86, 87).

"Your MIDAS muffler carries a written factory guarantee good from coast-to-coast!" (D. App. 86, 87).

conventions, wrote articles in the dealers' magazine, and even encouraged others to become Midas dealers (Statement, *supra*, p. 7).

At any time plaintiffs could have unilaterally cancelled the franchise agreements upon thirty days' notice without burden or financial loss, but plaintiffs were unwilling to utilize this available alternative as they reaped their enormous profits through the Midas program. Skarupa's annual salary of $44,000 for 1958 exceeded his total personal income for all of the six years prior to Midas; he enjoyed personal and corporate profits of $182,763.31 from a personal investment of $9,800 in his four years with Midas (App. 61). Ross more than doubled his 1955-56 fiscal year earnings in his first full year and took home over $154,000 in profits during his Midas years (App. 68-69). Pierce's coterie of corporations and enterprises made it difficult to ascertain his personal profits from Midas, but he has never denied the $180,000 attributed to him for his three and a half Midas years (App. 75-76). Wheeler's wages of $6,000 in 1955 became $29,000 as a Midas operator in 1957. Additional corporate income netted him close to $100,000 before he switched to a competitive franchise (App. 82).

Only when a Midas competitor promised them even more grandiose profits and more territory did plaintiffs decide to forego their Midas profits. Their decision was not made because of a "higher [Midas] price for non-trademarked exhaust system parts" (Pet. 5), but in order to attempt to capitalize on the benefits of the Midas concept as appropriated by a competitor.

Section 4 of the Clayton Act enlists "... the *sufferer* to aid in enforcement of the statute," *Bruce's Juices, Inc.* v. *American Can Co.*, 330 U.S. 743, 757 (1947). It does not

allow a persistent participant to reap the windfall of treble damages when his avarice is no longer being satisfied by his active pursuit of the allegedly condemned practices. The plaintiffs here are not an injured party; indeed, if the Midas program were illegal, it is the public which has been injured by the plaintiffs in cooperation with the defendants. Thus, the purpose of the antitrust laws is furthered by the doctrine of *in pari delicto,* as applied by the lower court, in barring these plaintiffs because of their cooperation and participation.

As stated by the court below:

> "Virtually every dealer, *particularly* plaintiffs, enjoyed substantial monetary gains from *participation* in the Midas program. . . . They voluntarily *acceded* to, *fostered* and *profited* from the very practice about which they now complain. . . . It would be difficult to visualize a case more appropriate for the application of the *pari delicto* doctrine." (CAO B-5, B-9, B-13).

III. The Decision Below Does Not Conflict With The Decisions Of This Court Or Of Any Court Of Appeals.

As demonstrated above, this Court and the courts of appeals have uniformly and consistently recognized and approved *in pari delicto* as a defense in antitrust actions and no court has purported to abolish the doctrine.[22] Its applicability to any case depends upon the particular factual setting, as most clearly illustrated by the groups of cases in the same circuit, some applying and some rejecting the defense. In the Seventh Circuit itself, contrary to plaintiffs' contentions that that court considers the defense universally applicable (Pet. 25-27), the defense was rejected on the facts in *Jewel Tea Co.* v. *Local Unions,*

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[22] See cases cited in text and particularly in notes 12 and 14, *supra.*

etc., 274 F.2d 217, 223 (7th Cir. 1960), *cert. denied,* 362 U.S. 936 (1960), because plaintiff there was the "victim" not a participant in the alleged conspiracy. Later, on the facts in *Florists' Nationwide Telephone Delivery Network* v. *Florist Telegraph Delivery Ass'n.,* 371 F.2d 263, 267-268 (7th Cir.), *cert. denied,* 387 U.S. 909 (1967), and in this case, in both of which the plaintiffs participated fully in the alleged irregularities, the defense was accepted. Courts of appeals in other circuits have also accepted the defense in some cases and indicated that it did not apply in others where the facts differed.[23]

Analysis of facts to determine whether a court of appeals has correctly applied the *in pari delicto* doctrine is not one which warrants this Court's exercise of its certiorari jurisdiction. Accordingly, this Court has denied the writ in cases from the Seventh and Fourth circuits which applied the defense as well as in those in which the defense was rejected.[24] The same result should occur in the instant case, particularly when there is no conflict in any of the decisions and the facts here demonstrate that this is a most appropriate case for the application of the defense.

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[23] In the Second Circuit, compare *Eastman Kodak Co.* v. *Blackmore,* 277 Fed. 694 at 700-701 (2d Cir. 1921) with *Ring* v. *Spina,* 148 F.2d 647 at 653 (2d Cir. 1945); in the Fourth Circuit, *Pennsylvania Water & P. Co.* v. *Consolidated G. E. L. & R. Co.,* 209 F.2d 131, 133-34 (4th Cir. 1953), *cert. denied,* 347 U.S. 960 (1954) with *Osborn* v. *Sinclair Refining Co.,* 286 F.2d 832 (4th Cir. 1960), *cert. denied,* 366 U.S. 963 (1961), second opinion, 324 F.2d 566, 568-69 (1963).

[24] See cases cited in text above and preceding footnote.

IV. Dismissal Of Count One On The Alternative Ground That The Individual And Corporate Actions Of The Defendants Here Were Those Of A Single Integrated Business Entity Was Correct.

Throughout the trial court proceedings plaintiffs argued in accordance with Count One of the amended complaint that the corporate and individual defendants engaged in a *horizontal* combination or conspiracy to restrain trade.[25] However, the corporate and individual relationships herein established that only one business entity has ever been involved and as this Court has stated it is the "substance" of the relationships which is "determinative."[26] Each corporate defendant was wholly owned, controlled, managed and directed by Nathan and Gordon Sherman (D. App. 41). International Parts sold all the products and employed the five individual defendants (D. App. 42). Midas, Inc. had no employees and was merely a corporate shell to hold the Midas trademarks, trade names, service marks and franchise agreements for its parent,

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[25] The amended complaint alleged "the defendants and other co-conspirators *unknown* violated Section 1 of the Sherman Act . . . in that *they* combined together, . . . and/or contracted, . . . and/or conspired unlawfully to fix and maintain prices of automotive exhaust parts and to create and/or induce a commercial boycott . . . ." (D. App. 18-19).

[26] Defendants have never contended that common ownership and control alone immunizes them from the antitrust laws, *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 215 (1951). Instead, as *United States* v. *Yellow Cab Co.*, 332 U.S. 218, 227 (1947), on which *Kiefer-Stewart* depends, points out: "The corporate interrelationships of the conspirators . . . are *not determinative* of the applicability of the Sherman Act. That statute is aimed at *substance* rather than form."

International Parts (D.App. 44).[27] Midas could not possibly compete or hold itself out to compete with International and plaintiffs were fully aware that purchasers of Midas and International brands were necessarily the customers of only International.[28]

Now, the plaintiffs make a belated attempt to avoid their own words in the complaint and change the charge from a *horizontal conspiracy* among defendants and others "unknown" to a *vertical "contract"* with plaintiffs themselves. This contention was not made in the trial court where plaintiffs chose not to contradict the affidavit which established the substance of the corporate defendants' relationship. Such a switch from a theory alleging that plaintiffs as non participants were damaged by a conspiracy among defendants and outsiders to the present theory that plaintiffs and defendants contracted to damage plaintiffs, only places the plaintiffs more firmly in the position of *in pari delicto.* The court below did not "ignore" the contentions as to these contracts (Pet. 29); it decided the contract issue squarely in defendants' favor on the basis of the *pari delicto* defense.

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[27] The other corporate defendants are a manufacturing subsidiary and a distributing subsidiary which had no contact with, relationship to, or effect upon the plaintiffs (D. App. 42).

[28] Were Midas and International in substance separate business entities and sellers, how could plaintiffs justify their Count Three charge (D. App. 19-20) of price discrimination under the Robinson-Patman Act (15 U.S.C. 13) which requires two purchases from a single seller?

V. Summary Judgment In An Antitrust Suit Is Appropriate Where No Disputed Material Facts Exist.

Litigants have been expressly advised by the Court that "Summary judgments have a place in the antitrust field, as elsewhere. . . ." *White Motor Co.* v. *United States*, 372 U.S. 253, 259 (1963). The caveat that summary judgment should be used sparingly in "complex antitrust litigation where motive and intent play leading roles . . . [and] the proof is largely in the hands of the alleged conspirators. . . ." *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U. S. 464, 473 (1962) has no bearing on the factual or legal issues in the *pari delicto* defense here. "Proof of subjective states is not involved"[29] and furthermore, the undisputed "proof" from the "completed" and "exhaustive discovery procedure" (Pet. 29, f.n. 49) which established that these plaintiffs were *in pari delicto* did not come from any "alleged conspirators" but came "largely," if not almost totally, from the mouths of plaintiffs themselves.[30]

The Court in *White Motor Co.* v. *United States*, 372 U.S. 253 (1963) cautioned those opposing summary judgment motions that the present Civil Rule 56 does not allow them

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[29] *Crest Auto Supplies, Inc.* v. *Ero Mfg. Co.*, 360 F.2d 896, 900 (7th Cir. 1966).

[30] None of the cases cited (Pet. 29) other than *Poller* contain any mention of the appropriateness of summary judgment. In *Simpson* v. *Union Oil Co.*, 377 U.S. 13 (1964) and *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959), summary judgments were reversed on matters of substantive law, but the Court did not question the procedure. A motion to dismiss and a directed verdict were involved in *Radovich* v. *National Football League*, 352 U.S. 445 (1957) and *Continental Ore Company* v. *Union Carbide Corp.*, 370 U.S. 690 (1962).

to "rest upon mere allegations" but requires a response by affidavit or otherwise (372 U.S. at 254-55). Since plaintiffs never claimed "that any restriction was imposed by defendants other than those provided in the franchise agreements" (CAO B-5), the contractual arrangement to which they voluntarily agreed was the *sole basis* of plaintiffs' lawsuit and no factual issue could be raised. By their decision to file no counter-affidavit or counter-appendix or to avail themselves of the other remedies (or obligations) of Rule 56(f), plaintiffs accepted defendants' appendix and affidavit as the necessary and material facts to decide the summary judgment.[31]

There is nothing in the record to suggest that summary judgment was an incorrect procedure in this case.

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[31] The plaintiffs' deposition testimony excerpted in the Appendix attached hereto was "uncontroverted except by counsel's arguments" (DCO F-9) and also "plaintiffs have failed to counter the joint affidavit of Nathan and Gordon Sherman." (DCO F-12).

CONCLUSION

For the reasons set forth above the petition for a writ of certiorari to the Court of Appeals for the Seventh Circuit should be denied.

Respectfully submitted,

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